

Respondent objects to the admissibility of the October 7, 2010, report of physical medicine and rehabilitation specialist, Lynn A. Curtis, M.D., citing K.S.A. 44-515. The Board must also consider whether it has the jurisdiction to determine whether the October 7, 2010 medical report of Dr. Curtis is properly included in the record for the purposes of this hearing, pursuant to K.S.A. 44-534a and K.S.A. 44-515.

Claimant argues that the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent in March of 2008, originally handling appointments. But, due to pre-existing hearing deficits, claimant was moved to the position of pre-tester where she would assist patients read eye charts and measure their eyeball movements. Claimant claims injury to her left hand and wrist on April 17, 2009 after assisting a patient from a motorized chair into an examination chair. When the exam chair tipped, claimant's left upper extremity, up to her wrist, became stuck under the chair. Claimant sought medical treatment at Prompt Care and filled out workers compensation forms. X-rays taken of claimant's hands seemed to initially suggest that she broke her hand. Claimant was in a splint for a little over two weeks. Claimant testified that her "pointing finger"¹ became numb and remained that way as of the preliminary hearings.

Claimant first sought medical treatment with Sunflower Prompt Care on April 17, 2009. She displayed pain in her left hand, specifically, the last three fingers. The question on the admission form which asked if this was work related was marked "no", but directly below that question are the words "exam chair".² Claimant told the medical personnel that the last three fingers on her left hand had been smashed, and pain was shooting up into her arm, with numbness and tingling. Additionally, the left hand was swollen on the dorsal side and her hand and wrist flexor was tender. Braces were placed on claimant's 4th and 5th digits on the left hand. Claimant's index finger is not mentioned in the report.

Claimant followed up with her family physician, Patricia Patrinely, D.O., at St. Francis Family Medicine. The initial report, dated April 29, 2009, indicates pain in claimant's mid and upper back and discusses hormone replacement efforts. The only mention of the left upper extremity describes pain in her left hand, with no indication as to the cause. The assessment contained in a May 12, 2009, report discusses menopausal symptoms and postural back pain. The past medical history discusses the carpal tunnel syndrome diagnosed in claimant's right wrist from an earlier problem. But, there is no mention of the left upper extremity. Office notes on November 10, 2009, July 19, 2010, July 27, 2010 and September 14, 2010, contain no information regarding claimant's left upper extremity. Claimant testified that she received pain medication from her regular

¹ P.H. Trans. (Dec. 28, 2010) at 16.

² *Id.*, Resp. Ex. A at 8.

physician for her left upper extremity. However, the medical notes of Dr. Patrinely contain only references to pain medication for her back.

Claimant was referred by Dr. Patrinely to neurologist Wade Welch, M.D., for an examination on September 28, 2010. Claimant presented for an evaluation for migraines, arm pain, and a diagnosis of cistern lipoma from a 2004 evaluation. Claimant described a significant number of physical problems, including migraine headaches for many years, neck pain, bilateral TMJ, and left hand numbness in digits one, two and three, with the most intense on the second digit. Claimant has experienced intermittent numbness/tingling in her toes for many years. Claimant was diagnosed with unilateral throbbing headaches, left hand/bilateral lower extremity numbness and tingling, possible entrapment or peripheral neuropathy and lipoma. An MRI of the brain and EMG's were recommended.

Claimant returned to Dr. Welch on November 29, 2010, for a follow-up exam. She reported improvement of the migraine headaches but her left hand numbness and tingling was worse. Claimant reported wrist pain and night awakening from the tingling in her left arm. Claimant attributed the left hand symptoms to the April 19, 2009 accident. The EMG displayed moderate bilateral median neuropathy at the wrist and mild sensory polyneuropathy. She was diagnosed with carpal tunnel syndrome in the left upper extremity. A carpal tunnel release was suggested.

Claimant testified that she had another accident on May 2010 when she injured her left wrist while changing a light bulb. Claimant described trying to remove a light bulb from an old light fixture which she described as cheap. The bulb was stuck in the light and claimant tried to twist it back and forth to loosen it. When she did, her left wrist popped. Claimant felt pain up her arm, into her shoulder and neck. She testified that she tried to contact Lisa to fill out workers compensation paperwork and was told that she would be contacted, but never was. Claimant quit her job with respondent on October 28, 2010, due to the pain in her hand, wrist and shoulder. Claimant did not relate in her resignation letter that the reason for her pain was because of the injuries she had in April 2009, or May 2010.³

Claimant was referred by her attorney to board certified physical medicine and disability consulting physician Lynn A. Curtis, M.D., on October 7, 2010. The history of injuries provided to Dr. Curtis was consistent with claimant's testimony. Dr. Curtis was told that claimant had a history of right carpal tunnel syndrome, but not on the left, which is inconsistent with claimant's past medical exams. Claimant reported left hand/wrist numbness and swelling with night awakening. Claimant also displayed left shoulder pain. Dr. Curtis recommended medical treatment for left wrist carpal tunnel syndrome, including an MRI and treatment for tendonitis of the left shoulder. Dr. Curtis opined that the carpal

³ *Id.* at 27.

tunnel syndrome diagnosis in the left upper extremity was related to the crush injury on April 17, 2009.

Claimant was referred by respondent to board certified plastic surgery and hand surgery specialist Lynn Ketchum, M.D., on February 16, 2011, for a diagnosis and causation determination. Dr. Ketchum noted that claimant had two work accidents while working for respondent. The first was to her left hand while assisting a handicapped patient into the examination chair and the second to her left wrist while changing a light bulb. Dr. Ketchum noted that claimant has had right carpal tunnel syndrome since 2007, with the cause unknown. He diagnosed claimant with flexor carpi radialis tendonitis, left bicipital tendonitis and weakness of the left upper extremity, which he determined to be carpal tunnel syndrome. He recommended claimant have carpal tunnel surgery on her left arm. He did not feel that claimant's right carpal tunnel syndrome was work-related.⁴

Dr. Ketchum examined the claimant and opined the following:

... She does have bilateral carpal tunnel syndrome and needs staged carpal tunnel releases but there is no indication of why she developed carpal tunnel syndrome on the right when she was not working and it is hard to believe that the injury that she sustained in April 2009 when her hand was caught under the table would have caused left carpal tunnel syndrome. It is more likely that caused the flexor carpi radialis tunnel syndrome and the episode with the light bulb likewise would not cause the carpal tunnel syndrome so I do not know why she had developed left carpal tunnel syndrome. It is more likely that it is for the same reason that she developed it on the right and which was not work-related.⁵

Dr. Ketchum was deposed on September 15, 2011, at which time he testified that claimant's need for left carpal tunnel syndrome surgery is related to the April 2009 accident. Although, respondent argues that the doctor changed his opinion regarding the cause of the left carpal tunnel syndrome, Dr. Ketchum testified that his opinion was that the carpal tunnel syndrome wasn't caused by the April 2009 accident, it was aggravated.⁶

Q. Okay. You were supplied with the -- both EMGs from Doctor Welch and Doctor Zhao from my office at the time you wrote your February 16 -- or before you wrote your February 16, 2011, letter?

A. Correct

Q. And you had the records from Sunflower Prompt Care at that time too?

⁴ Ketchum Depo., Ex. 2 at 3 (Dr. Ketchum's Feb. 16, 2011 report).

⁵ *Id.*

⁶ *Id.* at 19-21.

A. Right

Q. Yet you've changed your opinion today?

A. No. No. My opinion was it wasn't caused by, it was aggravated.⁷

Dr. Ketchum testified that one symptom claimant related from the time of the injury was numbness in the index finger lasting until the time he saw her.⁸

Q. The records reflected that the table smashed her three fingers and that she had swelling on her fourth and fifth digits, correct?

A. Yes.

Q. Does that lead you to believe that the table fell on the end of her hand at her fingers since the medical records from the date of the accident demonstrated only swelling to the top part of the body and no swelling to the wrist or the hand?

. . .

A. All it says was swelling to the wrist and hand.

Q. Didn't say anything about bruising to the wrist or hand, right?

A. Right.

Q. In light of that, does that cause you some concern in standing by your opinion that you've rendered today for the first time that the April 17, 2009, event aggravated the preexisting median nerve entrapment thus causing the need for carpal tunnel surgery?

A. Right. The record does not indicate it. The patient stated that she had swelling and ecchymosis and bruising--

. . .

Q. If the exam table or chair did not fall on that part of her arm then would it be your belief that the need for the carpal tunnel syndrome [sic] would be a result of the preexisting median nerve entrapment, which is demonstrated from the MRI of Doctor Zhao in 2007?

A. EMG.

⁷ *Id.* at 20.

⁸ *Id.* at 31.

Q. EMG. I said MRI, didn't I? Thank you. Correct?

A. Correct.

. . . .

Q. Okay. She didn't give you any sort of history of an overuse of the right arm or further injury to the right arm during the course of her employment, correct?

A. She didn't. She just said she was using her right arm and went back to work.⁹

The record indicates that claimant was diagnosed by Dr. Zhao with bilateral carpal tunnel syndrome in 2007, based upon EMG's taken at that time. Dr. Ketchum testified that he doesn't know why claimant developed carpal tunnel syndrome on her left side in 2007 and doesn't know why she developed the same thing on the right side sometime before 2007.¹⁰ He opined that people who don't work can develop carpal tunnel syndrome.

At the December 28, 2010 preliminary hearing, respondent objected to the October 7, 2010 report of Dr. Curtis, pursuant to K.S.A. 44-515. Respondent argues that the report was not provided in a timely manner as required by the statute. The report, according to claimant's attorney was supplied on approximately December 2, 2010, shortly after the report was received from the doctor's office. Claimant's attorney stated that he was billed for the report by the doctor on November 21, 2010 and paid the bill on November 24, 2010. It would have been shortly thereafter that the report was received and he immediately forwarded it to respondent's attorney.

At the conclusion of the preliminary hearing, respondent was asked about the admissibility of Dr. Curtis' report. He responded:

MR. MCCURDY: Yeah. I mean, I -- I suppose I ought to -- I mean, with-- it might as well come in. I mean, I guess at this stage it--¹¹

At that point, the ALJ admitted the report into the record. It is not clear from the above whether respondent was or was not objecting.

⁹ *Id.* at 33-35.

¹⁰ *Id.* at 45.

¹¹ P.H. Trans. (Dec. 28, 2010) at 52-53.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."¹⁴

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.¹⁵

The medical records in this matter create confusion. Claimant has a long history of numbness in all of her extremities. She also has a several year history of bilateral carpal tunnel syndrome. However, she also suffered an accident on April 19, 2009, which appeared to increase the symptoms in her left upper extremity. Dr. Ketchum, the medical expert originally appointed by respondent, appears to be the most credible regarding claimant's accidents on April 17, 2009, and May 10, 2010, and their effect on claimant's

¹² K.S.A. 44-501 and K.S.A. 44-508(g).

¹³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

¹⁵ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

left hand and wrist. He did initially state in his report that claimant's left upper extremity carpal tunnel syndrome was not caused by the work injury. However, during his deposition, he clarified his causation opinion when he explained that the accident, while not causing the carpal tunnel syndrome, did aggravate the condition. Claimant testified that her symptoms were worse after the April 17, 2009 accident. Respondent argued that the inconsistent positions of Dr. Ketchum should result in his causation opinion being totally rejected. However, this Board Member finds Dr. Ketchum's explanation credible.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?¹⁶

The preliminary hearing Order of the ALJ does not actually address causation. It merely denies respondent's motion for a change of the authorized treating physician. That issue is not one over which the Board takes jurisdiction from the appeal of a preliminary order. However, it is clear from this record that the underlying issue deals with whether claimant suffered personal injury by accident to her left wrist which arose out of and in the course of her employment with respondent. The Board does take jurisdiction over that issue on an appeal from a preliminary hearing. As claimant has satisfied her burden of proving that her need for carpal tunnel syndrome treatment in her left upper extremity was caused or aggravated by the April 17, 2009, accident, the Order of the ALJ denying respondent's motion should be affirmed.

Additionally, the ALJ allowed the medical report of Dr. Curtis into the record over what appears to be a rather uncertain objection by respondent. The Board does not have jurisdiction of this issue. Evidentiary rulings at preliminary hearings are properly left to the determination of the ALJ.

¹⁶ K.S.A. 44-534a(a)(2).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that her left upper extremity carpal tunnel syndrome was aggravated by the accident on April 17, 2009.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated January 6, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

¹⁷ K.S.A. 44-534a.